2013 IL App (2d) 130285-U
No. 2-13-0285
Order filed November 19, 2013

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Boone County.
Plaintiff-Appellee,	)	
v.	)	No. 13-DT-1
SCOTT FRANK LIEBENBERG,	)	Honorable C. Robert Tobin,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE HUTCHINSON delivered the judgment of the court.
Justices Zenoff and Jorgensen concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court properly denied defendant's petition to rescind his summary suspension: the arresting officer did not erroneously advise defendant that he could not refuse testing; instead, he properly advised him that he could not refuse a breath test in favor of some other test.

¶ 2 The driving privileges of defendant, Scott Frank Liebenberg, were summarily suspended after the results of a Breathalyzer test indicated that defendant's alcohol concentration was in excess of the legal limit. Defendant petitioned to rescind the suspension, arguing, among other things, that the arresting officer did not properly warn him about the consequences of refusing or submitting to

testing. Evidence presented at the rescission hearing revealed that defendant initially consented to take a Breathalyzer test after the officer read the "Warning to Motorist" to him, but, after he failed to sufficiently blow into the machine so that it could register his alcohol level, defendant asked the officer if he had to take the test. The officer indicated that defendant was required to submit to a breath test, as that was the type of test the officer had chosen. Based on this evidence, the trial court denied the petition, and this timely appeal followed. On appeal, defendant argues that advising a defendant that he has to take a Breathalyzer test constitutes misinforming him. Thus, because the officer told defendant that he had to submit to a breath test, defendant contends that the summary suspension of his driving privileges must be rescinded. Based on the evidence presented in this case, we disagree. Accordingly, we affirm.

¶ 3 The following facts are relevant to resolving the issue raised in this appeal. On January 1, 2013, Officer David Mordt responded to the scene of a driving under the influence (DUI) investigation. When Mordt arrived on the scene, he found defendant, the subject of the investigation. The officer read to defendant, a first-time offender, the "Warning to Motorist." Specifically, pursuant to the "Warning to Motorist," Mordt first advised defendant about what qualifies a person as a first-time offender. Then, the officer told defendant:

> "If you refuse or fail to complete all chemical tests requested and:
>
> If you are a first offender, your driving privileges will be suspended for a minimum of 12 months; *or*
>
> If you are not a first offender, your driving privileges will be suspended for a minimum of 3 years[.]
>
> ***

If you submit to a chemical test(s) disclosing an alcohol concentration of .08 or more *** and

If you are a first offender, your driving privileges will be suspended for a minimum of 6 months *or*

If you are not a first offender, your driving privileges will be suspended for a minimum of 1 year." (Emphases in original.)

¶ 4 After Mordt read the warning to defendant, defendant asked Mordt if he could speak to his attorney, and Mordt told defendant that "at this point he had to make that decision on his own." Defendant submitted to a breath test. However, because defendant was unable to provide a sufficient breath sample, the Breathalyzer machine registered that defendant refused testing. Mordt nevertheless gave defendant a second opportunity to take the breath test. Mordt indicated that "[defendant] said that he would like to—or he was thinking about refusing and asked me about that." Later, it was clarified that defendant was asking whether "he had to provide [a] breath sample." Mordt was asked, "as exactly as possible," to "explain what you told [defendant] in response to that question." In response, Mordt told defendant "that the State of Illinois requires you to take a blood, breath, or urine—whatever the officer would request of you—and I told him that I'm requesting a breath sample." Defendant told the officer that "he would give the breath sample under duress." Mordt took this to mean that "[defendant] would give a breath sample, but he was not happy about not being able to contact an attorney in order to make that decision."

¶ 5 Mordt was asked whether, before defendant submitted to testing a second time, the officer reread the entire "Warning to Motorist" to defendant. In response, Mordt indicated that "[he was] not sure on that," and admitted later that he did not. In clarification, counsel asked Mordt whether

he "just told [defendant], what [the officer] recall[ed], is [the officer] telling [defendant] that he had to give [the officer] a sample." Mordt indicated that that was incorrect. Rather, the officer "said that the State of Illinois requires it, but [he was] requesting a breath sample." Mordt then indicated that "[he was] not for sure on during the period between the first blow and the second blow if [he] advised [defendant] of what the first offender was."

¶ 6 The trial court denied defendant's petition. In doing so, the court found, among other things, that:

> "First of all, there's no doubt, or it is undisputed that [defendant] was given the verbatim 'Warning to Motorists' first time around. So at the least, at the very least, [defendant] knew exactly everything he was suppose[d] to under the statute.
>
> The question is whether or not a response by the officer to a question by the defendant, as to whether or not [defendant] had to take it, somehow undoes that. And here, I don't see anything that [the officer] said to be contrary."

¶ 7 At issue in this appeal is whether defendant's petition to rescind the statutory summary suspension of his driving privileges was properly denied. Section 11-501.1 of the Illinois Vehicle Code (the Code) (625 ILCS 5/11-501.1 (West 2012)), which is commonly referred to as the "implied-consent law," provides that a motorist operating a vehicle on a public highway in Illinois is deemed to have consented that, if arrested for DUI, he will submit to chemical testing to determine his alcohol level. If the motorist refuses to undergo testing, or submits to testing that reveals an alcohol level of 0.08 or more, the motorist's driving privileges will be summarily suspended. 625 ILCS 5/11-501.1(d), (e) (West 2012). A motorist who refuses to submit to testing is subject to a

longer suspension of driving privileges than a motorist who submits to testing and fails. *People v. Bavone*, 394 Ill. App. 3d 374, 378 (2009).

¶ 8 A defendant who has his driving privileges summarily suspended may challenge that suspension by filing a petition to rescind the suspension. Under section 2-118.1(b) of the Code (625 ILCS 5/2-118.1(b) (West 2012)), there are four grounds on which a petition to rescind may be based. That is, a petition to rescind may be based on: (1) whether the defendant was placed under arrest for an offense delineated in section 11-501 of the Code (625 ILCS 5/11-501 (West 2012)); (2) whether the officer had reasonable grounds to believe that the defendant was driving while under the influence of alcohol; (3) whether the defendant received the statutory motorist's warnings and refused to complete the test; and (4) whether, after being so advised, the defendant submitted to the test and the test disclosed an alcohol concentration of 0.08 or more, or any amount of a prohibited substance. 625 ILCS 5/2-118.1(b)(1)-(b)(4) (West 2012).

¶ 9 When a defendant appeals from the denial of a petition to rescind, we employ a two-part standard of review. See *People v. Wear*, 229 Ill. 2d 545, 560-61 (2008). That is, we will reverse any factual findings the trial court made only if the findings are against the manifest weight of the evidence. *Id.* Findings are against the manifest weight of the evidence when the opposite conclusion is clearly evident from the record. *People v. Torres*, 160 Ill. App. 3d 643, 646 (1987). However, we review *de novo* the trial court's ultimate legal ruling on the petition to rescind. *Wear*, 229 Ill. 2d at 562.

¶ 10 Here, defendant alleged in his petition to rescind the statutory summary suspension of his driving privileges that he was not properly warned. Defendant claims that the statutory summary

suspension of his driving privileges must be rescinded, because, essentially, Mordt misadvised him that he could not refuse testing.

¶ 11 *People v. Johnson*, 197 Ill. 2d 478 (2001), is the seminal case on proper warnings. There, our supreme court examined what happens when a defendant facing the statutory summary suspension of his driving privileges is misinformed. In doing so, the court first explained that "[t]he threat of an extended suspension for motorists who refuse the test motivates individuals to take the test so that the State may gain objective evidence of intoxication." *Id.* at 487. Such evidence "helps the State achieve the overall goal of the statute—to help prosecute and remove 'problem drivers' from the highways." *Id.* Thus, the warnings required under the implied-consent law are not designed to permit the motorist to make an informed choice about whether to submit to testing. Rather, the warnings are designed primarily to assist law enforcement authorities by encouraging cooperation with their efforts to collect evidence of intoxication. The court noted, however, that, as a matter of fairness, a police officer may not misinform a motorist, who might rely on the misinformation. *Id.* at 488.

¶ 12 While recognizing that the warnings prescribed by the implied-consent law are mandatory, the *Johnson* court reasoned that "[t]o hold that *any* misinformation—even misinformation which does not concern the motorist—warrants rescission defeats the purpose of the statute." (Emphasis in original.) *Id.* at 488-89. Noting that "[i]f the motorist was misinformed as to the potential suspension of an individual in his or her situation, he was not properly warned" (*id.* at 488), the *Johnson* court held that "in reviewing a petition for rescission based on inaccurate warnings, courts must determine merely whether the motorist is a member of the group affected by the inaccuracy" (*id.* at 489). In *Johnson*, the motorist was advised that a non first-time offender who refuses or fails

to complete testing is subject to a two-year suspension, when the applicable suspension period for such a motorist is actually three years. However, because the defendant was a first offender, the *Johnson* court upheld the statutory summary suspension of the defendant's driving privileges, reasoning that the misinformation did not directly affect the potential length of the defendant's suspension. *Id.*

¶ 13 With the above framework in mind, we turn to the unique facts of this case. Here, defendant, who was a first-time offender, was told that if he submitted to testing and failed his driving privileges would be summarily suspended for 6 months, but, if he refused to undergo testing, his driving privileges would be summarily suspended for 12 months. After defendant was so advised, he opted to take a Breathalyzer test, which was the test that Mordt had chosen. If those were the only facts involved in this case, our resolution of this appeal would be easy. That is, it is clear that defendant was properly warned and that he chose to submit to testing. Assuming that the machine registered a breath-alcohol concentration in excess of the legal limit, defendant's driving privileges would be summarily suspended for six months.

¶ 14 In addition to these facts, however, the evidence revealed that defendant failed to give a sufficient sample, and, thus, the Breathalyzer machine registered defendant as having refused testing. If defendant would have accepted that or if Mordt had not allowed defendant to submit another sample, the Secretary of State would have been notified that defendant refused testing, and defendant's driving privileges would have been summarily suspended for 12 months. Again, because defendant was properly warned about the consequences of refusing or submitting to testing before he attempted to take the test and failed to sufficiently complete it, it is clear that, if these were

the only facts before us, defendant's driving privileges would have been properly suspended for 12 months.

¶ 15 The problem in this case is that, after the Breathalyzer machine registered defendant as having refused testing, Mordt offered defendant an opportunity to retake the breath test, and defendant asked the officer about refusing. Although the evidence presented at the hearing was somewhat equivocal about whether defendant was referring to refusing *all* testing or refusing a breath test, Mordt appeared to interpret the question as whether defendant could refuse a breath test and choose another form of test, *i.e.*, a blood or urine test. Indeed, Mordt's response—that he was "requesting breath"—would have made no sense if defendant was asking about refusing all testing. We thus presume that the trial court found that Mordt informed defendant only that he could not choose a different test. See *Hanson-Suminski v. Rohrman Midwest Motors, Inc.*, 386 Ill. App. 3d 585, 596 (2008).

¶ 16 Mordt's reference to refusing a breath test versus refusing all testing is important. If Mordt was referring to defendant's ability to refuse all testing, the officer misinformed defendant, as all defendants have the right to refuse. *People v. Fisher*, 184 Ill. 2d 441, 444 (1998). However, as noted, when Mordt told defendant that he could not refuse, he was saying that defendant could not refuse a breath test and elect to take another type of test. Nothing about this response was improper. See *People v. Kiss*, 122 Ill. App. 3d 1056, 1059 (1984) (noting that "test is to be administered at the direction of the arresting officer, and the law enforcement agency employing that officer is to designate which of the enumerated tests shall be administered").

¶ 17 Citing *Howell v. State*, 597 S.E.2d 546 (Ga. App. 2004), defendant argues that his petition to rescind the statutory summary suspension of his driving privileges should have been granted,

because he essentially revoked his consent when he asked Mordt about refusing testing. In *Howell*, the defendant was given implied-consent warnings, and, after they were read to him, the arresting officer asked the defendant whether he wanted to submit to a breath test. *Id.* at 548. The defendant said no. *Id.* The officer, who customarily did not accept refusals at the scene and had been instructed to place a defendant before the breath machine before accepting a refusal, put the defendant in the officer's squad car and transported the defendant to the police station. *Id.* Once at the station, the officer asked a second officer to administer a breath test, the second officer placed the defendant before the breath machine, and the second officer told the defendant that not blowing into the machine would be considered a refusal. *Id.* The defendant submitted to testing, and that testing revealed that the defendant's alcohol concentration was in excess of the legal limit. *Id.*

¶ 18 The reviewing court found the practice improper. *Id.* In so finding, the court observed that, at the scene, "[the defendant] unequivocally revoked his implied consent." *Id.* Despite this refusal, the defendant, after being transported to the police station, was "asked a second time whether he would consent to a state-administered test." *Id.* at 549. Because "no evidence [indicated] that [the defendant] rescinded his refusal and thereafter consented," the court determined that it could not "deem such a procedure to be fair or such actions by an officer to be reasonable." *Id.*

¶ 19 We find *Howell* inapposite to the present case. In *Howell*, the defendant quite clearly revoked his implied consent, and no evidence established that the defendant rescinded his refusal and thereafter consented to testing. Here, in contrast, defendant submitted to testing, and, after failing to provide the officer with a sufficient breath sample, defendant asked the officer whether he could refuse to submit a breath sample. The difference between *Howell* and this case is that, in a sense, the defendant in *Howell* was told that he could not refuse testing, whereas defendant here

merely was told that he could not choose another type of test. In the former instance, rescission is required, because, as noted, all defendants have the right to refuse testing and that refusal must be respected. In the latter, as noted, a defendant does not have the right to refuse one type of testing in favor of another. Thus, we conclude that defendant's petition to rescind the statutory summary suspension of his driving privileges was properly denied.

¶ 20 For these reasons, we affirm the judgment of the circuit court of Boone County.

¶ 21 Affirmed.